

Persons who permanently affix tangible personal property to real estate act as construction contractors and incur Use Tax liability on their cost price of tangible personal property they physically incorporate into realty. See 86 Ill. Adm. Code 130.1940. (This is a GIL).

August 15, 2001

Dear Xxxxx:

This letter is in response to your letter that we received on May 15, 2001. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), which can be accessed at [www.revenue.state.il.us/legalinformation/regs/part1200](http://www.revenue.state.il.us/legalinformation/regs/part1200).

In your letter, you have stated and made inquiry as follows:

During a recent Sales Tax audit, the auditor questioned the way that we charge sales tax to our customers. COMPANY is requesting a Private Letter to help us clarify the proper way to collect and pay sales tax.

COMPANY is a diversified company divided into five departments: Nursery (18.14%), Greenhouse (30.90%), Flowershop (18.89%), Landscape (5.72%), and Garden Center (27.17%).

We produce a significant portion of the plants that we sell in the Greenhouse and Nursery. Other plants are purchased from growers around the country. We consider ourselves as retailers because most plant and products are sold over the counter to walk-in customers.

Enclosed, you will find a register tape of a typical transaction which includes the following items: Bag of fertilizer, taxable, (taken with the customer); Shovel, taxable, (taken); Three shrubs, taxable, (taken); Six foot pine tree, taxable, (delivered & planted); Delivery charge, non-taxable; and Planting charge, non-taxable.

Is this the proper way to tax the pine tree?

I have checked with several other Garden Center owners in Illinois and we all handle this transaction in the same manner.

We have enclosed 86 Ill. Adm. Code 130.1965, the Department's regulation that explains the sales tax liabilities of florists and nurserymen. You incur a Retailers' Occupation Tax (sales tax) liability on tangible personal property that you sell at retail. This would include fertilizer, shovels and

other tools, and shrubs, flowers, trees or other plants that your customers receive at your location. It would also include trees or other shrubs that you sell and deliver to customers but are not planted by you into the land of the purchaser. See 86 Ill. Adm. Code 130.1965 (c)(1).

We have enclosed a copy of 86 Ill. Adm. Code Sec. 130.415 concerning Transportation and Delivery Charges. If such delivery charges are included in the selling price of the property that is sold, the expense is an element of cost to sellers and subject to tax, Section 130.415(c). Whether retailers may deduct delivery charges in calculating Retailers' Occupation Tax liability depends not upon the separate billing of such delivery charges but upon whether the charges are included in the selling price of the property. Delivery charges may be excluded from gross receipts and not be subject to Retailers' Occupation Tax where sellers and buyers agree upon the charges separately from the selling price of the merchandise, and such charges are actually reflective of the costs of delivery. The best evidence that delivery charges were agreed to separately and apart from selling prices, are separate and distinct contracts for delivery. Alternatively, documentation in the records of sellers that purchasers had options of taking delivery of the property at sellers' locations, for the agreed purchase prices, or having delivery made by sellers for the agreed purchase prices plus ascertainable delivery charges, may suffice.

When you sell young trees, shrubbery or similar items and you transplant such items into the ground of the purchaser, you are acting as a construction contractor and you would incur a Use Tax liability on your cost price of such items, 86 Ill. Adm. Code 130.1965(c)(2). The invoice copy you appended to your letter shows this type of transaction. You would therefore owe Use Tax at the rate of 6.25% of your cost price of the Austrian Pine, in addition to your Retailers' Occupation Tax liability on your gross receipts from the other items of tangible personal property. You would pay the Use Tax on your (ST-1) sales tax return for the period you withdrew this item from inventory and sold and transplanted it at your customer's location.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at [www.revenue.state.il.us](http://www.revenue.state.il.us). If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b).

Very truly yours,

Karl W. Betz  
Associate Counsel

KWB:msk  
Enc.